United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1422

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CURCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

FRANK CARUSO, ROBERT D'ADDARIO, MICHAEL DIAURI, MICHAEL DI RIENZO, a/k/a "The Fish," ANDREW DiSIMONE, LEO FARANDA, CARMINE GAGLIANO, JOSEPH BUGLIARELLI, a/k/a "Blue," JOSEPH MESSINA, DANIEL LATELLA and EMIL ANNATONE,

Defendants.

MICHAEL DI RIENZO

Defendant-Appellant.

On appeal from the United States District Court for the Southern District of New York

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BRIEF FOR APPELLANT MICHAEL DI RIENZO

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BRIEF FOR APPELLANT MICHAEL DI RIENZO

ISSUES PRESENTED

1. Whether the use of state wiretaps which did not comply with the state sealing law, could support the probable cause requirement for a federal wiretap warrant.

2. Whether the District Court did not take proper account of state law pertaining to the question of standing to challenge the state taps.

3. Whether the state wiretaps complied with state law where the tapes were not immediately sealed.

4. Whether the federal wiretap warrants were properly issued where there was no real showing of the inadequacy of other investigative procedures.

PRELIMINARY STATEMENT

This case is before the Court on an appeal from a judgment of conviction rendered upon appellant's plea of guilty to the crime of violating Section 1955, 18 USC. On September 20th, 1976, he was sentenced to a fine of $1500.00 and a two year term of incarceration, on the condition he be confined for a period of one month, and further that he be placed on probation for a term of three years. (Hon. Milton Pollack). The plea was enter subsequent to the denial of a motion to suppress, and this appeal is directed to the denial of that motion. Appellant has paid the aforementioned fine and is presently free of incarceration pending determination of this appeal.

FACTS BELOW

Eight state wiretaps were obtained and executed by state authorities. The following table discloses the telephone number tapped, the name of the issuing justice, date of order, the termination date and date of sealing:

	Tel No.	Justice	Order	Termination	Sealing
1.	547-6912	Sullivan	Oct. 26,'73	Nov. 25	Jan. 7,'74
2.	654-[illegible]07	Bloom	Nov. 12,'73	Nov. 25	Jan. 7,'74
3.	823-2318	Bloom	Nov. 28,'73	Dec. 18	Jan.11,'74
4.	881-4450	Bloom	Dec. 10,'73	Jan. 8,'74	Feb. 1,'74
5.	653-3341	Bernstein	Jan. 24,'74	Feb. 5,'74	Mar.21,'74
6.	994-2007	Chananau	Apr. 22,'74	May 21,	May22,'74
7.	798-5522	Hughes	Junell,'74	June 30,	July 1,'74
8.	594-6466	Roberts	Sept.18,'73	Oct. 9,	Oct. 18,'74

Additionally, District Court Judges Ward, Owen and Motley authorized federal wiretaps (A 161, A 216, A 254, A 312).

In an affidavit sworn to on August 15, 1974, in support of a federal wiretap order, Special Agent Julius J. Bonavolonta stated:

> "My experience, and the experience of other Special Agents of the Federal Bureau of Investigation, and members of the New York City Police Department, has shown that raids of gambling establishments and searches of gamblers in the past have not resulted in the gathering of sufficient physical or other evidence to prove all elements of federal offenses or the complete nature and scope of a gambling operation. I have learned through my experience

and the experience of other agents and officers previously described who have investigated gambling operations, that gamblers usually do not keep permanent records." (A 250).

In an affidavit sworn to on October 11, 1974, in an application for a federal search warrant for the premises named in the wiretap orders, Special Agent Bonavolonta swore:

"There is probable cause to believe that evidence of the commission of the aforesaid crimes, contraband obtained in the commission of the aforesaid crimes and property which has been used, is designed for and which is intended for use in the commission of the said crimes, to wit, records of the illegal gambling enterprises, papers, slips, and devices utilized to accept, record and compute wagers and monies owed to and by bettors and other participants in the illegal gambling business; records, papers, lists, slips and devices utilized to identify participants in the illegal gambling business, United States currency, telephone lines and instruments and other gambling paraphernalia used to further the said illegal gambling business, will be found on the premises and persons captioned above."
(A 366)

After an evidentiary hearing, the District Court denied the suppression motion and in an opinion, held that only defendants D'Addario, Dituri, and Faranda had standing to challenge the federal taps on the grounds that they were dervied from defective state taps, and then, only in regard to two state taps (A570).

As to those two state taps, the District Court found satisfactory explanation for the delay in the sealing of the tapes (A571-573).

At the time of plea, appellant reserved his right to appeal from the denial of the suppression motion, and pleaded guilty to the second count of the indictment, Section 1955, 18 USC, (A558) and at sentencing, the first count of the indictment, charging violation or Section 371, 18 USC, was dismissed (A564).

In view of appellant's age and physical condition, it is respectfully requested that this Court review the sentence imposed upom him. While in all candor the incarceration part of the sentence may not be characterized as unduly harsh or severe, imprisonment of any duration may well have disasterous consequences for appellant, and he respectfully requests that the incarceration provision of the sentence be nullified.

ARGUMENT

Point One

AS THE STATE WIRETAPS DID NOT COMPLY WITH THE SEALING REQUIREMENTS OF STATE LAW, IT WAS UNLAWFUL TO DISCLOSE INFORMATION OBTAINED THEREOF.

It was the holding of the District Court that the federal taps, which were derived from the state taps, were not tainted by virtue of the delayed sealing of the state tapes. The District Court further held that of the eight state taps, only defendants Dituri, D'Addario, and Faranda had standing to challenge the validity of the three federal taps on the grounds of their being tainted by the underlying state taps. The District Court erred in its too restrictive ruling on the question of standing.

In reviewing the validity of the state taps, this Court must look to New York law, United States v. Rizzo 491 F.2d 215, 217 (2nd Cir.1974); United States v. Manfredi, 488 F. 2d 588, 598-599 (2nd Cir.1973); United States v. Marion, 535 F.2d 697, 702 (2nd Cir.1976). In examining the applicable New York law, it will be seen that the untimely sealing of the state tapes rendered those tapes a legal nullity, and the question of standing on Fourth Amendment grounds is not even to be reached.

Section 700.65 of the New York Criminal Procedure Law deals with the disclosure and use of information obtained by eavesdropping warrants. Subdivision 3 of this statute provides:

> "Any person who has received, by any means authorized by this article, any information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this article, may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subdivision two of section 700.50, or a satisfactory explanation of the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any communication or evidence derived therefrom." (emphasis added)

It is of no consequence that the statute speaks in terms of the "presence of a seal" and the concern in the case at bar is with untimely sealing; for it has been held, that an impermissible delay is tantamount to no sealing at all, People v. Simmons, -Misc.2d-, 378 S2d 263 (Sup. Ct. N.Y.Co. 1975). At 267, supra, the court stated:

"With one exception (citation omitted), the courts have

equated a delay in sealing with no seal at all and have forgiven the delay only upon a satisfactory explanation therefor (citations omitted)... Since the absence of a seal statutorily precludes introduction of tapes into evidence and our State's highest court ordered suppression in the absence of a seal, this court is setting no precedent and has no alternative in barring the use of recordings at trial."

New York's highest court recently had occassion to address itself to the consequences of non-compliance with Article 700 in People v. Sher, 38 N.Y. 2d 600, 604 (1976):

"From this review of the legislative history, it is clear that the requirements of article 700, which are reflective of controlling Federal law, must be strictly complied with. In the absence of compliance, the State officals lack authority to wiretap, and any interceptions they make are unlawful, and any evidence derived from the wiretap is inadmissible." (emphasis added)

A plain reading of the New York statute, discloses that it is a "pre-requisite" for the use or disclosure of an intercepted communication that there be compliance with the sealing requirements. Absent such compliance, it is against the law for the information to be disclosed. Therefore, the

very act of disclosing such information to a federal judge in an ex parte application for a federal wiretap order, is in and of itself illegal. The Fourth Amendment question is not even applicable, and the standing of a particular defendant is not in issue.*

It appears that eight state taps were utilized in securing the three federal wiretap warrants. Of these eight state taps, only two were promptly sealed; accordingly, the

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* Certainly an ex parte application before a federal judge is a criminal proceeding within the meaning of the Criminal Procedure Law, and is intended to come within the purview of Section 700.65.

Section 1.20 (18) CPL defines "criminal proceeding" as follows:

" 'Criminal proceeding' means any proceeding which
(a) constitutes a part of a criminal action or
(b) occurs in a criminal court and is related to a prospective, pending or completed criminal action, either of this state or any other jurisdiction, or involves a criminal investigation."

(emphasis added)

numerous intercepted communications obtained under the remaining six state taps were prima facie unauthorized to be disclosed for want of immediate sealing. Because of the readily apparent failure of these six taps to comply with the sealing requirements of the statute, it was incumbent upon the state court to establish if there was a satisfactory explanation for the delay; absent such a determination, the tapes derived therefrom could not by law be disclosed. The record does not disclose that the state court made such a determination. The record fails to disclose that the federal court too, made such a determination, prior to issuing the three federal warrants. Only upon the subsequent motion to suppress, did the District Court find a satisfactory explanation for the sealing delay,and then, because of its narrow application of the doctrine on standing, it only considered the delay as to two of the state taps, the "G & D" and "Social Club" taps. Nowhere, even now, is there a finding of a satisfactory explanation for the delay in sealing of the remaining four state taps. All of the state taps were employed in order to find probable cause for the federal warrants; all of the state taps should have been found to be valid. This was not done.

Point Two

UNDER STATE LAW, WHICH IS APPLICABLE TO THIS CASE, APPELLANT DOES HAVE STANDING TO CHALLENGE THE FEDERAL TAPS ON THE GROUND OF THEIR BEING DERIVED FROM DEFECTIVE STATE TAPS.

Even when applying the doctrine of standing, the District Court erred in holding that only defendants Dituri, D'Addario, and Faranda could challenge the state wiretaps. Alderman v. United States, 394 U.S. 165, 175 (1969), expressly takes note that the various states may formulate their own rules on standing, and may extend the exclusionary rule to include anyone.

People v. Brown, 80 M.2d 777 (Sup. Ct. N.Y.Co., 1975, Roberts, J.) presents a careful analysis of a respected court bearing directly on the issue in point. Subsequent to numerous interceptions pursuant to wiretaps issued without sufficient probable cause, there followed certain renewal warrants which were based on probable cause, but which were derived from the preceding illegal interceptions. By means of new, but tainted interceptions, the police overheard two men whom they previously overheard, and also for the first time, a third additional man. In discussing this third man's standing to challenge the tainted nature of the validly

issued renewal warrant, the court reasoned, supra at 785:

> "It should be clear from the foregoing that the only standing defined by Alderman is a procedural pre-requisite to an objection to the ultimate introduction of illegally obtained evidence at the trial. The standing doctrine in general is the procedural embodiment of the balance struck between the personal character of Fourth Amendment rights and the deterrent aims of the exclusionary rule (394 U.S. 165, 174-175). It requires, as a predicate to exclusion, that one who objects to a constitutional violation be someone who has been personally affected by it to an extent greater than by the mere ultimate introduction of its fruits against him at the trial. Once this threshold requirement has been met (as is has when someone's conversations have been seized) standing, at least as enunciated in Alderman, has no other application. Its use as a substantive rule which permits illegally obtained eavesdropping to be cleansed when the defects are eliminated before new victims appear was not contemplated by the court in Alderman."

The court continued, supra at 787:

> "As a result of this clear violation of the

Constitution an eavesdropping foothold was established and maintained for months without probable cause until it directly produced the sole basis for eavesdropping upon the same individuals at another location, where the defendant Brown was later overheard. To hold that Brown cannot attack his own interception on this basis without first demonstrating additional 'standing' to object to the illegality of itssource would intolerably undermine the deterrant aim of the exclusionary rule and its companion principle that the State must not be permitted to profit from its own illegality (Mapp v. Ohio, 367 U.S. 643). Such a holding would encourage Fourth Amendment violations which, though suppressible by some, could nevertheless ensnare others whose timing - and the legalism of standing - would preclude them from objecting. It would reward illegality in proportion to its duration and expansion. Such result would be unconscionable."

In People v. Koutnick, 44 AD2d 48 (1st Dept.,1974) the Appellate Division was concerned with a similar case whereby

there were 107 wiretap orders; the supporting affidavits were insufficient, and each was derived from the preceding one. The court treated the question of standing as follows, supra at 53:

> "Moreover, though not all appellants may challenge all of the wiretap orders, and some may challenge none of them, each subsequent order is predicated on information obtained from previously authorized interceptions, and are so interwined and interrelated as to cast a shadow upon the entire investigation. Thus, if we start with the first affidavit above quoted, supporting the wiretap order on Leigh's phone, and accept its legal insufficiency, we cannot reasonably conclude that its connection with the subsequent wiretap orders and the discovery of the challenged evidence had 'become so attenuated as to dissipate the taint' (Nardone v. United States, 308 U.S. 338,341); or that any lawfully obtained orders were not procured by exploiatation of the first improperly granted order (Cf. Wong Sun v. United States, 371 U.S. 471; People v. Robinson, 13 N.Y.2d 296). Accordingly, the suppression motions should have been granted."

See also, People v. Amsden, 368 S2d 433 (Sup. Ct. Erie Co., 1975),

where the court interpreted the term "agrieved person" under Section 2510 (11) 18 USC, as a person who has his conversation intercepted; accordingly, such a person "can raise the question of any unlawful practice or procedure followed in the authorization of the wiretap directed against him" (supra at 436).

The simple fact is that in the case at bar, illegal state wire taps supplied the predicate showing of probable cause for the issuance of the federal taps. Appellant was aggrieved by it, and has standing to challenge the state illegality.

Point Three

THE STATE WIRETAPS DID NOT COMPLY WITH THE SEALING REQUIREMENTS OF STATE LAW.

It should be noted that of the eight state taps, only two complied with state law, i.e. Justice Chananau's order of April 22nd, which was sealed on May 22nd after terminating on May 21st, and the warrant pursuant to Justice Hughes order of June 11th, which was sealed on July 1st after terminating on June 30th. Of the remaining six state wiretaps, the delay in sealing after termination of the tap is 12, 12, 24, 24, 44, and 9 days respectively. None of these delays can satisfy Section 700.50 (2), C.P.L. which requires that upon expiration of a wiretap order, the tapes be "immediately"

brought before the court and sealed. Nor is there a satisfactory explanation of this delay in regard to these six state wiretaps. Prima facie there is no compliance with Article 700.

The District Court did find a satisfactory explanation for the delay in sealing of two tapes, i.e. "G & D" tap (44 days) and the "Social Club" tap (24 days). However, even assuming arguendo that the delay in sealing in these two instances was satisfactorily explained, there is still no accounting for the remaining six state taps. All of the state taps were used in finding probable cause for the federal wiretap warrants.

The fact that the delays in the "G & D" and "Social Club" taps were not obtained by the state prosecutors for purposes of tactical advantage, as found by the District Court, is of no materiality. It is the potential for abuse which underlies New York strict interpretation of Article 700. As the Court observed in People v. Nicoletti, 34 N.Y.2d 249, 253 (1974):

> "There is, of course, no indication whatever that the tape recordings herein were altered in any way and we intimate no such view. It is the potential for such abuse to which we address ourselves".

See also, People v. Sher, supra.

Point Four

THERE WAS A FAILURE TO DEMONSTRATE THE INADEQUACY OF OTHER INVESTIGATIVE PROCEDURES IN THE APPLICATION FOR FEDERAL WIRETAP ORDERS.

"To guard against the realization of Orwellian fears and conform to the constitutional standards for electronic surveillance operations..." is the underlying rationale for the enactment of Title III, United States v. Marion, supra at 698.

Section 2518 (1) (C), 18 USC, expressly provides that an application for a wiretap warrant must contain:

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

In examining the applications of Special Agent Bonavolonta, it can be seen that his affidavits do not explain what other investigative procedures have been tried and failed; instead, they contain mere conclusory statements, boiler-plate. Not only is there mere boiler-plate explaining failure with other investigative procedures, but there are directly contradictory statements set forth as to

whether evidence of crime existed at the premises in question. In one affidavit Special Agent Bonavolonta swore that only electronic surveillance would bring forth evidence of crime, and in another, an affidavit in support of a search warrant, he swore that probable cuase existed for the recovery of contraband and other evidence of crime from the very same premises. This miscarriage of the judicial process is not resolved by the District Court's comment in its decision denying the suppression motion that "Although this analysis suggests that the alleged inconsistency between the two supporting affidavits is more perficial than real, there is little doubt that greater candor in the government's affidavits was in order." Either there was probable cause to believe evidence of crime would be recovered, thereby making electronic surveillance unnecessary, or the search warrant was based on a perjurous affidavit. Either alternative is a poor reflection on the government's conduct in this case.

The power of government to eavesdrop on a person's private conversation is most awesome indeed. As was noted in Berger v. New York, 388 U.S. 41, (1976):

> "The 'indiscriminate use of such devices [electronic eavesdropping] in law enforcement raises grave

constitutional questions under the Fourth and Fifth Amendments', and imposes a heavy responsibility on this court in its supervision of the fairness of the procedures."

Because of the very nature of surrepititious electronic surveillance, it is not to be used in the first instance when other less odious investigative procedures are available, hense the requirement of 18 USC, Section 2518 (1) (C). Recently, as reported in the New York Times (NOvember-December, 1976), the Attorney General for the United States stated that upon first taking office, he was appalled at the pro forma method of signing wiretap warrants. In the case at bar, there was no real substantive attempt as required by law, to set forth other investigative procedures tried and having failed, or why they reasonably appeared unlikely to succeed. See United States v. Kalustian, 529 F.2d 585 (9th Cir., 1975).

CONCLUSION

The judgment below should be vacted and the order denying the motion to suppress reversed.

December 14, 1976

Respectfully submitted,

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